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No. 87-860

In the Supreme Court of the United States

OCTOBER TERM, 1987

JARRETT E. WOODS, JR., ET AL., PETITIONERS

v.

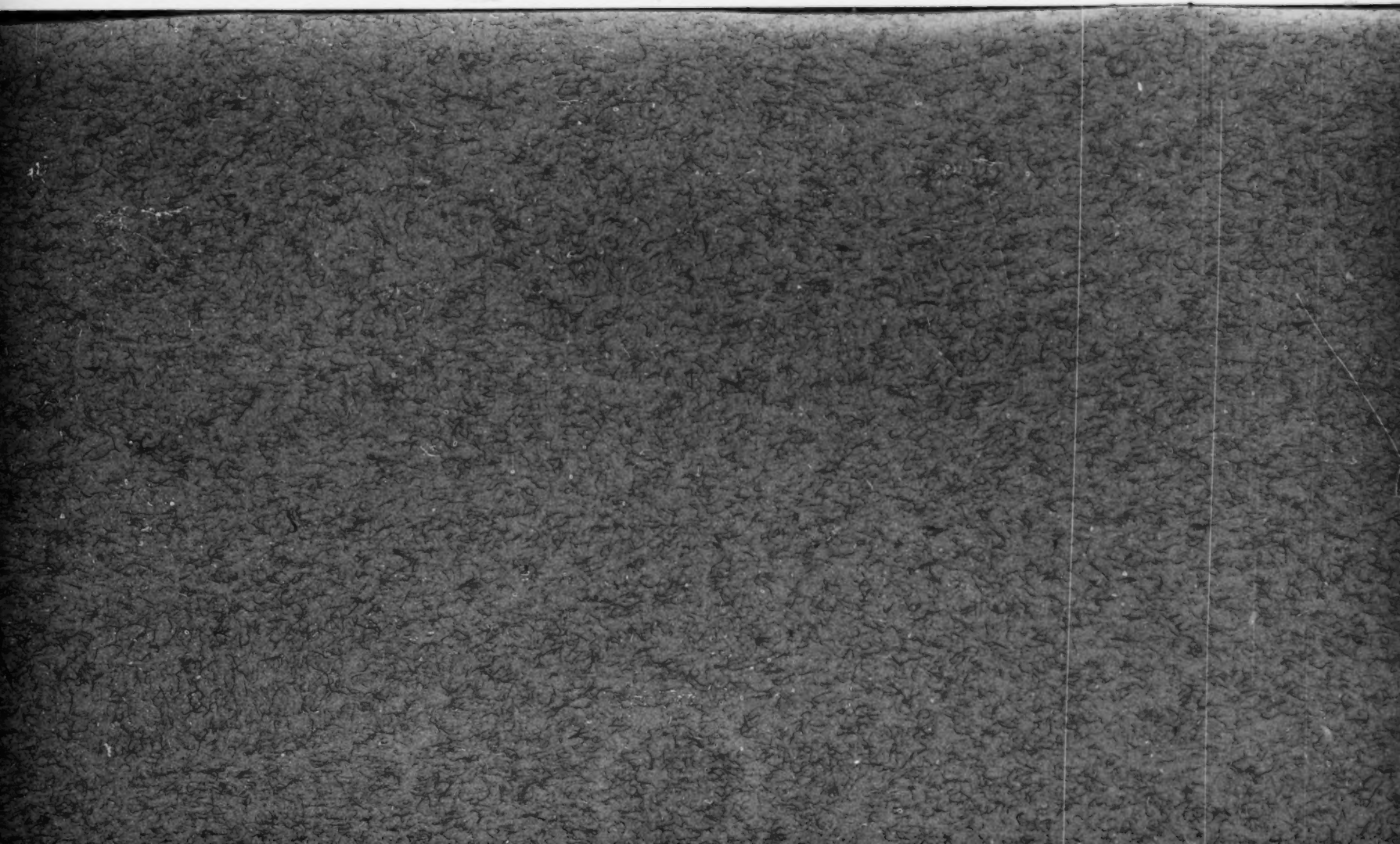
FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552



QUESTION PRESENTED

Whether the court of appeals properly affirmed a district court order upholding the Federal Home Loan Bank Board's appointment of a receiver for a federally-insured savings and loan association.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 826 F.2d 1400. The opinion of the district court (Pet. App. 30a-41a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a) was entered on August 27, 1987. The petition for a writ of certiorari was filed on November 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for petitioner Western Savings Association

(Western), a financially-distressed, federally-insured thrift institution.[1] Petitioners, including Western, the thrift's parent corporation, and two officers, challenged the Bank Board's actions on various constitutional and statutory theories. The district court rejected petitioners' challenges and the court of appeals affirmed.

1. Petitioner Woods acquired Western in 1982. Prior to that time, Western was a relatively small federally-insured savings and loan institution that relied on deposits by local individuals and businesses to make single-family mortgage loans. Woods, however, adopted an agressive growth policy that relied on "brokered" and "jumbo" deposits to make various types of high risk loans. As a result of this policy, Western's book assets grew from approximately $34 million in 1982 to more than $1.9 billion in 1986. See Pet. App. 3a, 31a.[2]

The Bank Board conducted a series of examinations of Western between 1982 and 1986. In February 1984, the

[1] The Bank Board is an independent agency of the Executive Branch of the United States that is responsible, pursuant to Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. IV) 1464, for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. 1464(a). The Bank Board is also the operating head of FSLIC, the corporate governmental agency of the United States that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. (& Supp. IV) 1724 *et seq.*, for insuring deposits in all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

[2] During this period, the Bank Board had cautioned savings and loan associations about the sort of aggressive growth policy Western followed here. See, *e.g.*, 50 Fed. Reg. 6891, 6894-6896 (1985). Brokered deposits and jumbo deposits can be very volatile and often are characterized by above-market rates of return and short maturity terms. An association that seeks to offset the high cost of attracting and retaining those funds by investing them in high-rise, high-return projects is more likely to default and trigger the FSLIC insurance than a more conservatively managed association.

Bank Board's examiners filed a supervisory "adverse rating report" describing Western's rapid growth and risky lending practices. The examiners found "serious underwriting deficiencies in highly speculative ventures" (Pet. App. 3a) and improper documentation of large complex loans. The Bank Board conducted a special examination in March 1984, focusing on Western's portfolio of real estate loans. The examiners discovered numerous large loans with questionable security and loan documentation. The Bank Board examiners commenced a special examination in June 1984 to investigate Western's commercial loan and financial accounting procedures. The examiners determined that Western had improperly inflated its reported net worth by more than $18 million through improper accounting practices. *Id.* at 3a-4a, 31a-32a.

In response to these disclosures, the Bank Board issued a temporary cease-and-desist order finding that Western had engaged in unsafe and unsound practices in violation of federal law and informed Western that it was entitled to an administrative hearing to contest the Board's findings. Western waived its right to a hearing and consented to a final cease-and-desist order restricting its lending practices and requiring it to obtain appraisals for loans secured by real estate, to comply with rules regulating loans to one borrower, and to conform its accounting practices to Bank Board requirements. Pet. App. 4a, 32a.

Subsequent examinations revealed that, despite the Bank Board's supervisory efforts, Western was continuing its unsafe and unsound practices and was violating the cease-and-desist order. The Bank Board examiners discovered that Western had made new loans without proper appraisals and had continued to violate the rules regulating loans to one borrower. They also discovered extensive transactions be-

tween Western and a corporation whose board of directors included Western officers. Pet. App. 4a-5a, 32a-33a.[3]

On September 12, 1986, the Bank Board determined that Western was actually insolvent by at least $56 million as a result of losses in excess of $120 million that were not reflected on Western's books. The Bank Board found that these losses were the result of violations of law and unsafe or unsound practices by Western. The Bank Board concluded that Western was in an unsafe and unsound condition to transact business and appointed FSLIC as receiver for Western in accordance with Section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, 12 U.S.C. (Supp. IV) 1464(d)(6)(A).[4] The receiver took possession of Western and entered into a purchase and assumption transaction with a newly created federal savings and loan association (Western Federal). Pet. App. 5a-6a, 33a.

2. Petitioners commenced this action in the United States District Court for the Northern District of Texas challenging the Bank Board's action. See § 5(d)(6)(A), 12

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[3] Bank Board regulations require thrift institutions to submit monthly, quarterly, and annual financial statements and answer all Bank Board inquiries. Throughout this period, the Bank Board's examiners also held numerous meetings and consultations with Western's management and board of directors in the course of analyzing Western's loan files and its financial statements. They obtained independent appraisals of property securing large loans and caused a report to be prepared by Western's outside accountants. Pet. App. 5a.

[4] Section 5(d)(6)(A) of the Home Owners' Loan Act empowers the Bank Board to appoint a receiver if it finds that a federally-chartered association is insolvent, has suffered a substantial dissipation of assets as a result of improper practices, is in an unsafe or unsound condition to transact business, has wilfully violated a final cease-and-desist order, or has prevented the Board from inspecting its records. See 12 U.S.C. (Supp. IV) 1464(d)(6)(A). The National Housing Act extends this power to federally-insured, state-chartered institutions, such as Western. See 12 U.S.C. 1729(c)(1)(B).

U.S.C. (Supp. IV) 1464(d)(6)(A). The district court granted summary judgment in favor of the Bank Board, concluding that the statutory grounds for appointment of a receiver had been satisfied. The district court held that the materials submitted by petitioners in opposition to the Bank Board's motion for summary judgment failed to demonstrate the existence of a genuine issue as to any material fact. Pet. App. 40a-41a.

The court of appeals affirmed. The court agreed that judicial review of a Bank Board decision appointing a receiver is limited to determining whether one of the statutory grounds for that action, set forth in Section 5(d)(6)(A), existed at the time of the appointment (Pet. App. 9a). The court of appeals also agreed with the district court that the Bank Board's decision to appoint a receiver is subject to judicial review under the "arbitrary and capricious" standard (*id.* at 9a-15a). The court rejected petitioners' contention that the record in this case did not support the Bank Board's findings (*id.* at 16a-18a).

The court of appeals also rejected petitioners' claim that the procedures afforded them by the district court deprived them of due process. Pet. App. 18a-25a. It recognized that the risk of failure of a federally-insured savings and loan association falls most heavily on FSLIC as insurer, and that Congress therefore had granted the Bank Board "the strongest powers constitutionally possible in order to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds" (*id.* at 21a). The court concluded that "[t]he method provided—a court review of agency action under the arbitrary or capricious standard—is adequate to assure against the risk of mistaken deprivations" (*ibid.*).

Finally, the court of appeals rejected petitioners' assertion that the district court's grant of the Bank Board's summary judgment motion was inappropriate. Pet. App.

25a-29a. The court stated that petitioners had ample opportunity to rebut the Bank Board's factual assertions or to demonstrate the existence of material facts in dispute and that petitioners had failed to carry their burden (*id.* at 25a-26a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court accordingly is not warranted.

1. Petitioners first contend (Pet. 9-12) that the Bank Board's appointment of a federal receiver, subject to post-appointment judicial review, violates due process because it denied them a hearing conducted " 'at a meaningful time and in a meaningful manner' " (Pet. 10 (citations omitted)). That claim is clearly without merit. The procedures the Due Process Clause requires vary depending on the precise nature of the government function and the private interests involved. See, *e.g.*, *Brock* v. *Roadway Express, Inc.*, No. 85-1530 (Apr. 22, 1987), slip op. 7-8 (plurality opinion); *id.* at 1-2 (White, J., concurring in part and dissenting in part); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545 (1985); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). In this instance, Congress has properly determined that due process is satisfied by subjecting the Bank Board's decision appointing a receiver to post-appointment judicial review, as set forth in Section 5(d)(6)(A) of the Home Owners' Loan Act. See 12 U.S.C. (Supp. IV) 1464(d)(6)(A).[5]

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[5] Section 5(d)(6)(A) gives the Bank Board exclusive authority to appoint a receiver, stating (12 U.S.C. (Supp. IV) 1464(d)(6)(A)):

> The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein pro-

The government has a strong interest in preserving public confidence in thrift institutions and in protecting the integrity of the federal insurance program. See *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta,* 458 U.S. 141 (1982); *Fahey* v. *Mallonee,* 332 U.S. 245 (1947). Banking, in turn, "is one of the longest regulated and most closely supervised of public callings" (*Fahey*, 332 U.S. at 250). When a thrift institution verges on failure, the government must act quickly and decisively to protect the public interest. Thus, Congress reasonably concluded that the Bank Board should be able to appoint a receiver immediately, subject to post-appointment judicial review. Thrift institutions have long been subject to such procedures. In *Fahey,* this Court specifically upheld the constitutionality of Bank Board regulations, promulgated under a previous version of Section 5(d) (12 U.S.C. (1946 ed.) 1464(d)), that provided for post-appointment administrative review of the receivership decision, stating, "the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner" (*Fahey,* 332 U.S. at 253). Certainly, the amended Section 5(d) at issue here, which provides greater due process protections by sub-

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> vided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. * * *.

That section then provides for post-appointment judicial review of the Bank Board's decision, stating (*ibid.*):

> In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court * * * for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. * * *.

jecting the Bank Board's decision to immediate judicial review, is *a fortiori* constitutional.[6]

Petitioners further suggest (Pet. 11-12) that the district court denied them due process by granting the Bank Board's motion for summary judgment. As the court of appeals and the district court explained, petitioners had a full and fair opportunity to contest the Bank Board's decision to appoint a receiver in the post-appointment judicial review proceeding. They received notice and a full explanation of the Bank Board's justification for its action, which was set forth in the administrative record.[7] The courts below fully considered petitioners' challenge to the Bank Board's decision as set forth in petitioners' legal briefs, their witnesses' affidavits, and their multi-volume exhibits. Pet. App. 25a-28a, 38a-41a. The courts properly concluded that the Bank Board had demonstrated with overwhelming clarity that its appointment of a receiver was justified and that petitioners' "essentially anecdotal critique" of the Bank Board's decision failed to raise a material factual issue (*ibid.*).[8] The Bank Board was accordingly entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. The grant of sum-

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[6] Moreover, Western voluntarily submitted to these procedures when it sought federal deposit insurance. Thus, Western is poorly postured to challenge those procedures now. See *Fahey*, 332 U.S. at 255-256.

[7] Petitioners also had innumerable opportunities prior to the appointment of the receiver to contribute to the fact-finding process and to make their views, arguments, and factual positions known to the Bank Board. The record demonstrated that these views were presented to and considered by the Bank Board (Pet. App. 5a).

[8] As the district court further observed, "Even if [petitioners'] Response were factual, [petitioners] leave unchallenged many transactions and practices which provide ample evidence that the Bank Board's decision to appoint a receiver was not arbitrary and capricious. It is only necessary that one of the grounds specified in 12 U.S.C. § 1464(d)(6)(A) exist." Pet. App. 40a n.6; see also *id.* at 26a.

mary judgment did not deny petitioners a meaningful hearing; it simply reflected the insubstantiality of their claims.

2. Petitioners next contend (Pet. 12-17) that the district court erred in reviewing the Bank Board's decision to appoint a receiver under an "arbitrary and capricious" standard. They argue that Section 5(d)(6)(A) of the Home Owners' Loan Act required the district court to make a de novo determination whether a receiver should be appointed. The court of appeals correctly rejected this argument. As we have already explained (note 5, *supra*), Section 5(d)(6)(A) gives the Bank Board exclusive power to appoint a conservator or receiver if, in its opinion, one of the statutory grounds for appointment exists; the district court's role is limited to post-appointment judicial review. The section specifically provides that "the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)). The court of appeals correctly concluded that the court should make its determination under the usual standards for judicial review of agency action: the court should examine whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). See *Camp* v. *Pitts,* 411 U.S. 138 (1973).

Petitioners are mistaken in contending that Section 5(d)(6)(A)'s use of the phrase "upon the merits" displaces the normal judicial standards for reviewing agency action and requires the district court to make a de novo determination whether a receiver should be appointed. As the court of appeals recognized, the plain language of the phrase "upon the merits" does not specify a standard for judicial review; instead, the phrase indicates that the court's decision whether to grant relief must be "based on the existence of statutory grounds for appointment" (Pet. App. 11a). Indeed, if Congress had intended to take the extraordinary step of allowing courts to conduct a de novo examination

of the Bank Board's receivership decisions, it would have made that intention manifest. Here, as in *Camp*, the agency's decision is subject to review under the "arbitrary and capricious" standard.

Finally, we note that there is no conflict among the courts of appeals on this statutory question requiring this Court's resolution. The two courts of appeals that have considered this question—the Fifth Circuit here, and the Eighth Circuit in *Guaranty Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 794 F.2d 1339 (1986)—are in agreement. There is some disharmony among the district courts on the question. See Pet. App. 12a-13a.[9] But the courts of appeals are capable of resolving those inconsistencies. There is no conflict warranting this Court's review.

3. Finally, petitioners contend (Pet. 17-18) that even under the "arbitrary and capricious" standard, they were entitled to "make a searching inquiry into the 'whole' record" through extensive discovery. The Bank Board's reasons for appointing a receiver were, however, clear from and amply supported by the detailed administrative record. The

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[9] For example, in *San Marino Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 605 F. Supp. 502, 508 (C.D. Cal. 1984), and *Washington Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 526 F. Supp. 343, 350, 353-354 (N.D. Ohio 1981), the district courts applied an arbitrary or capricious standard of review. In *Telegraph Savings & Loan Ass'n* v. *FSLIC*, 564 F. Supp. 862 (N.D. Ill. 1981), cited by petitioners, the court stated that the statute "seems to require" de novo review (*id.* at 869), but in fact applied a very deferential standard, recognizing a presumption in favor of the Bank Board's determination and concluding that the reasonableness of the decision was not an issue for the court to consider (*id.* at 875-877). In *Fidelity Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 540 F. Supp. 1374 (N.D. Cal. 1982), the court concluded in dicta that de novo review was appropriate but decided the case on other grounds. The court of appeals later reversed the district court's decision. See 689 F.2d 803 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983).

courts below properly concluded that petitioners' response to the Bank Board's motion for summary judgment failed to identify any genuine issue of material fact that required postponement for discovery. See Pet. App. 28a, 40a-41a. As the court of appeals explained, Fed. R. Civ. P. 56 "does not permit a party to avoid confronting his opponent's summary judgment proof by seeking discovery on factual matters that would not affect the legal basis for summary judgment" (Pet. App. 28a). The court's resolution of this fact-bound issue was correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board

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